

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID AVERY,

Defendant-Appellant.

UNPUBLISHED

February 5, 2002

No. 220595

Oakland Circuit Court

LC No. 98-161142-FH

Before: Owens, P.J., and Holbrook, Jr., and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of one count of conspiracy to commit larceny by false pretenses over \$100, MCL 750.157a, and one count of larceny by false pretenses over \$100, MCL 750.218. He was sentenced to probation for one year, with the first six months to be served in the county jail. We affirm.

This case involves a 1987 Honda automobile that was allegedly owned by defendant's girlfriend, Loretta Cane, and sold by defendant to Edna Braggs. The prosecution alleged a conspiracy between Cane, doing business as Triumph Auto Sales, and defendant to create an illusory loan agreement with Braggs in order to defraud the insurance company after the car was allegedly stolen.

First, defendant argues that insufficient evidence was adduced at trial to support his convictions. We disagree. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

Defendant's argument focuses on the paper trail that was presented at trial. Defendant argues that the false pretense involved in this case was that Crane was a secured lien holder on the car. According to defendant, Triumph's security interest was perfected when it was listed on the car's title.

Pursuant to the statutory scheme applicable at all times relevant to this case, a security interest is not perfect until it has attached. MCL 440.9303(1). It is reasonable to conclude from the evidence presented that the security interest never attached, and thus was never perfected. Braggs testified that she had never paid anything for the car. Additionally, although she signed

all paperwork concerning the car that defendant put in front of her, Braggs testified that she did not know what she was signing. Braggs indicated she did not know that she had signed a promissory note, an installment sales contract, or the settlement check from the insurance company. Braggs testified that she agreed to only pay \$750 for the car, not the \$7,570 listed on the sales contract. She also testified that she and defendant agreed that her obligation to pay \$750 was not due until she obtained her driver's license, which she never did. It is reasonable to infer from Braggs' testimony that defendant and Crane conspired to create a false loan agreement and a false lien on the car with the intent to deceive the insurance company. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant also argues that the trial court erred in denying his motion for a new trial based on his claim that the verdict was against the great weight of the evidence. Again, we disagree.

This Court reviews for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. [*People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001) (citation omitted).]

At the center of the prosecution's case was the testimony of Braggs. Deferring to the jury's superior position to assess witness credibility, *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), we do not believe that the evidence preponderates so heavily against the verdict that we cannot allow it to stand. Braggs' testimony was not so inherently implausible that a reasonable juror could not believe it. *Id.* at 644.

We also reject defendant's assertion that the trial court failed to consider the amount received by the insurance company in determining restitution. The record clearly establishes that the trial court considered this issue and agreed with defendant that he was entitled to offset any amount received by the insurance company from the sale of the recovered car. The probation order in the lower court record indicates that defendant paid "\$0" restitution, and defendant provides no evidence or argument to the contrary.

Defendant also argues that he was denied a fair trial because of improper jury instructions. Because defendant did not object to the instruction below, we review the alleged errors under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

First, defendant asserts that the trial court erred by including the following in its instruction on false pretenses:

Third, that at the time he used the pretense the defendant intended to defraud or cheat someone. Fourth, that another person relied on defendant's pretense. Fifth, that by relying on that pretense, that person suffered the loss of something of value.

Defendant argues that this instruction did not make clear that it was the victim who must detrimentally rely on the false pretense. Specifically, defendant contends that the references to "someone" and "another person" would have led the jury to believe that it was Braggs, not the insurance company, who was the victim of the crimes charged.

We do not believe defendant has established the elements of the plain error rule. The instruction given was correct. The assertion that the jury was misled into believing that Braggs was the victim of the charged crimes is pure speculation. In fact, potential jurors were told before trial that the prosecution would "try to prove . . . that this defendant was in some way involved in trying to get money from an insurance company."

Next, while we agree with defendant that the court's instruction on character evidence was unclear, we do not believe that the fairness, integrity or public reputation of the trial was thereby undermined. Significantly, defendant indicated at trial that he was satisfied with the instruction as given. Further, contrary to defendant's assertion, character evidence is not a defense to the crimes charged. We also reject defendant's contention that the challenged instruction somehow served to undermine his right to remain silent.

Defendant next contends that the trial court used the wrong standard in deciding his motion for a directed verdict. Defendant's argument is based on the trial court's statement that it viewed the evidence adduced up to the time the motion was made as being weak. However, the record shows that immediately after making this comment, the court correctly identified the standard it had to follow when ruling on a motion for a directed verdict. Accordingly, we find no merit to this argument.

Next, defendant argues that he was denied a fair trial by improper comments made by the prosecutor. We disagree. Because defendant did not object to the challenged conduct below, we review this claim for outcome determinative plain error. *Carines, supra*.

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (citations omitted).]

Viewing the prosecutor's comments in light of the defense arguments, we are not convinced that any error affecting defendant's substantial rights occurred. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992).

Defendant, an African-American, also contends that in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), the prosecution improperly excluded an African-American male from the jury, thereby denying him a fair trial under the Fourteenth Amendment of the United States Constitution. We disagree. There were three African-Americans on the venire. One of them was seated on the jury without challenge and two were peremptorily dismissed by the prosecutor. Defendant's argument relates to the dismissal of one of these two potential jurors. We agree with the trial court that the prosecutor stated racially neutral reasons for the dismissal. *Id.* at 97. Accordingly, we find no abuse of discretion on the part of the trial court. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997).

Finally, defendant argues that counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct and improper jury instructions discussed above. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*¹ hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

In all but one of the instances cited, we find no merit to defendant's underlying challenges. Therefore, for each of these we conclude that defendant has not established that counsel's performance fell below an objective standard of reasonableness. As for the instruction on character evidence, we conclude that defendant has not established the requisite level of prejudice.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).